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No. 110

In the Supreme Court of the United States

OCTOBER TERM, 1950

THOMAS A. GUBIR, PETITIONER

v.

L. C. SCHILDER, WARDEN, FEDERAL REFORMATORY, CHILLICOTHE, OHIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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OPINION BELOW

The opinion of the Court of Appeals (R. 576–581) is reported at 180 F. 2d 662. The Findings of Fact and Conclusions of Law of the trial court appear at R. 17–23.

JURISDICTION

The judgment of the Court of Appeals was entered March 20, 1950 (R. 575). The petition for a writ of certiorari was filed May 23, 1950, and an order granting the writ was entered June 5, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether resort to a petition for a new trial under Article 53 of the Articles of War is a prerequisite to an attack on a court-martial judgment through habeas corpus.

STATUTES INVOLVED

The relevant statutory provisions including the applicable Articles of War are set forth in the appendix to this brief at pages 24–30.

STATEMENT

On April 27, 1948, a petition for a writ of habeas corpus was filed in the United States District Court for the Southern District of Ohio on behalf of Thomas A. Gusik. The petition (R. 1–7) alleged that Gusik was in respondent's custody pursuant to a court-martial judgment convicting him of murdering two persons while stationed in Italy as a member of the armed forces of the United States; that he was denied due process of law; that there was no evidence before the military tribunal connecting Gusik with the fatal bullets; that he was not afforded a competent pre-trial investigation in accordance with AW 70;[1] that he was denied counsel of his own choosing and was represented by incompetent counsel; that the court-martial was guilty of misconduct; that the trial judge advocate suppressed

[1] The Articles of War (10 U. S. C. 1472 et seq.) will be cited as AW —.

evidence favorable to him; and that a statement was obtained from Gusik in a manner inconsistent with the Fifth Amendment. The writ issued (R. 8) and on June 17, 1948, respondent filed a return (R. 9–14), to which petitioner filed a traverse (R. 14–17). After a hearing the court entered an order on March 31, 1949, sustaining the writ and releasing Gusik upon bond (R. 23–24). In its conclusions of law the court found that the court-martial did not have jurisdiction (1) because no thorough and impartial pre-trial investigation was conducted in compliance with AW 70; (2) because the Trial Judge Advocate failed to call all material witnesses; and (3) because Gusik was denied the effective assistance of counsel.

Upon appeal to the Court of Appeals for the Sixth Circuit the order was reversed without consideration of the merits of the contentions advanced by petitioner in the habeas corpus court. The Court of Appeals held that petitioner had failed to exhaust the remedy provided by AW 53 to petition the Judge Advocate General for a new trial and that exhaustion of this remedy is a condition to the exercise of habeas corpus jurisdiction (R. 577–581).

SUMMARY OF ARGUMENT

By enacting Article of War 53 Congress provided a post-conviction corrective procedure designed to permit a calm reexamination of court-

martial convictions obtained during the stress of war. That the remedy is an effective one is evident from the fact that relief has been granted in 11.7 percent of the cases in which petitions have been filed pursuant to AW 53. There is no conceivable reason why the firmly-rooted principle that all other remedies must be exhausted before a habeas corpus court will act should not be adhered to in cases involving court-martial judgments. The same considerations of policy which are persuasive with respect to the relations between state and federal courts are equally applicable with respect to the relations between civil courts and military tribunals.

Petitioner's argument that the finality provision of AW 53 forecloses all habeas corpus review rests on a misconstruction of the statute. The language making the military determination final simply makes explicit what has been the settled course of judicial decision, namely that the civil courts should not review court-martial trials on their merits. The legislative materials conclusively show that the finality language was not intended to foreclose habeas corpus review of jurisdictional questions.

The regulations issued by the President pursuant to AW 53 and the administrative practice conform to the congressional purpose.

ARGUMENT

SINCE ARTICLE OF WAR 53 PROVIDES AN EFFECTIVE METHOD FOR CORRECTING ERRORS IN COURT-MARTIAL PROCEEDINGS, RESORT TO THAT ARTICLE MUST BE HAD BEFORE A CIVIL COURT MAY CONSIDER A PETITION FOR HABEAS CORPUS

This Court has held consistently that, where a person seeks in a Federal court to attack collaterally his conviction in a State court, ordinarily the attack must fail if he has not exhausted the available remedies in the State courts. *Ex parte Hawk,* 321 U. S. 114, *Mooney* v. *Holohan,* 294 U. S. 103; *Ex Parte Abernathy,* 320 U. S. 219; *Darr* v. *Burford,* 339 U. S. 200. Similarly, this Court has refused judicial review of administrative determinations where there has been a failure to exhaust administrative remedies. See e. g., *United States* v. *Sing Tuck,* 194 U. S. 161; *Falbo* v. *United States,* 320 U. S. 549. The policy considerations which underlie these decisions are so firmly rooted in our law that Congress has now specifically written them into the Judicial Code with respect to collateral habeas corpus review of State and Federal judgments of conviction. Section 2254 of 28 U. S. C. which is set forth in the Appendix at p. 28, relating to State court convictions, expressly provides that a writ of habeas corpus shall not be granted unless it appears that the applicant has exhausted the remedies available in the State courts, and the statute makes it plain that the remedies have not been exhausted "if

he has the right under the law of the State to raise, by any available procedure, the question presented." Likewise, 28 U. S. C. Section 2255, Appendix, pp. 29–30, relating to Federal court convictions, requires that the writ shall not issue unless the prisoner has availed himself of the statutory remedy by motion in the convicting court to vacate, correct or set aside the sentence.

The sole issue which this case presents is whether the policy which has commended itself both to this Court and Congress shall be applied with respect to courts-martial. In addition to the decision below and the decision in the *Whelchel* case (No. 109, O. T. 1950), every other decision on the question has held that resort to AW 53 is a prerequisite to habeas corpus. *Hunter* v. *Beets,* 180 F. 2d 101 (C. A. 10), certiorari denied, 339 U. S. 963; *McMahan* v. *Hunter,* 179 F. 2d 661 (C. A. 10), certiorari denied, 339 U. S. 968; *Simmons* v. *Hunter,* 179 F. 2d 664 (C. A. 10), certiorari denied, 339 U. S. 968; *Evans* v. *Hunter,* 180 F. 2d 354 (C. A. 10); *Dickens* v. *Hunter,* 179 F. 2d 784 (C. A. 10); *Reck* v. *Hunter,* 179 F. 2d 784 (C. A. 10); *Hiatt* v. *Burchfield,* 179 F. 2d 679 (C. A. 5), certiorari denied, 339 U. S. 987; *Hiatt* v. *Jackson,* 179 F. 2d 680 (C. A. 5), certiorari denied, 339 U. S. 968; *Hiatt* v. *Fugate,* 179 F. 2d 679 (C. A. 5); *Spencer* v. *Hunter,* 177 F. 2d 370 (C. A. 10). This Court refused to review five of the decisions so holding.

As we show below, Congress has provided in the

system of military law a corrective process for righting injustices. That process which provides relief in the broadest possible terms—"upon good cause shown"—permits a review far broader than that available in habeas corpus. In view of the strong policy which has always caused the civil courts to narrow their functions in reviewing or correcting proceedings in the military courts, every pertinent consideration leads to the conclusion that petitioner should be required to exhaust the remedies available to him before he asks the civil courts collaterally to review the military judgment.

1. *AW 53 Provides an Effective Post-conviction Remedy.*—As a result of the experience gained in the administration of military justice during World War II, Congress enacted various modifications of the Articles of War for the purpose of better insuring ultimate justice. (62 Stat. 604, 627–644, 10 U. S. C., Supp. II, 1472–1593). Included in the new legislation which became effective February 1, 1949, is AW 53 (10 U. S. C., Supp. II, 1525), which added a procedure for correcting errors in convictions and sentences which have been finally approved and ordered executed. AW 53 permits a prisoner within one year of his conviction, or within one year after the end of World War II, whichever is later, to apply to the Judge Advocate General upon a showing of good cause for a new trial or to vacate sentence and to restore rights, privileges, and

property affected by such sentence. It is to be noted that the petition for new trial authorized by AW 53 is separate and distinct from the power of the reviewing authority under AW 52 to direct a rehearing on the basis of matters of record. AW 53 is designed to permit a reconsideration of a final conviction on the basis of facts of record and of facts dehors the record.

Consistently with the provisions of AW 53, the President has prescribed regulations which appear in chapter XXII of the Manual for Courts-Martial, United States Army, 1949 (effective February 1, 1949), pp. 108–110. Under these regulations, a person whose conviction has been finally confirmed may file a petition for relief, either in person or by counsel and regardless of whether he is in the service or has been separated from the service. The petition must be in writing and signed under oath or affirmation by the accused or his representative and must set forth, in full, the basis upon which it is claimed there has been an injustice. Where facts outside the record are relied upon, the petitioner is required to submit the affidavit of each person whom he expects to present as a witness in the event of a new trial. Upon request, the Judge Advocate General may allow oral argument on the petition and, where necessary, he may undertake an additional investigation into the facts to secure such additional evidence as he may deem appropriate. If the

Judge Advocate General is persuaded petition presents "good cause" he may grant a new trial or such other appropriate relief. We are advised by the offices of the Judge Advocates General of the Army and Air Force that during the period from February 1, 1949, to July 10, 1950, 389 applications under AW 53 were received by them, and that 284 were acted upon during that period. Relief was granted in 33 cases.[2] Of the cases in which relief

[2] In sponsoring the new AW 53, Brigadier General Hoover of the Judge Advocate General's Department testified as follows (Hearings before a Subcommittee of the Committee on Armed Services, House of Representatives, on H. R. 2575, 80th Cong., 1st sess., pp. 2121–2122):

"General HOOVER. The amended article of war 53 is entirely new. I may say that the conception, the idea of it is taken largely from Mr. Durham's bill. It provides for a new trial as distinguished from a rehearing, after the sentence has been ordered into execution. It provides for the grant of a new trial upon application to the Judge Advocate General and gives the Judge Advocate General the power to grant a trial de novo, a new trial in every sense, or to vacate sentences and restore rights and privileges lost as a result of executed sentences. It is limited in time to 1 year after final disposition of the case on appellate review and in the case of World War cases to 1 year after the termination of the war or final disposition, whichever is the latter. It is also provided that there shall be but one application for new trial in any one case. The principle of this article is adopted with the thought that it will provide a means of correcting possible injustices, particularly with respect to cases tried in time of war where the accused person may not have had an opportunity to present fully his defense in ordinary course.

"Mr. ELSTON. As I see it, General, there are two limitations on this right. The first is the petition for a review

under AW 53 was denied, at least three accused persons have petitioned a federal court for writs of habeas corpus. In none of those cases has it

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which would have to be in accordance with regulations issued by the President.

"General HOOVER. Yes, sir.

"Mr. ELSTON. And in the second place, the Judge Advocate General would have the discretion of saying whether or not the petition could be entertained.

"General HOOVER. Yes, sir. His decision in that respect would have to be final, and it is so provided in the amendment.

"Mr. ELSTON. Why shouldn't it be an absolute right, rather than discretionary right?

"General HOOVER. Because good cause ought to be shown before the Government is put to the expense of a new trial. If it were not discretionary, I think we should have to retry a great many cases where there would be no reasonable cause for a new trial at all. Take the ordinary desertion case, where the man admitted his absence, admitted his intent to remain away from the Army during the war. He was given a sentence within normal limits. His application for new trial is not accompanied by any showing that he was prevented in any way from presenting his defense or by any showing that he has new evidence, or by any showing that error was committed. There would not seem to be any reason in such a case to grant a new trial.

"Mr. ELSTON. What would the procedure be if a petition for a new trial were filed? Would the accused be granted a hearing on his petition?

General HOOVER. Yes, sir.

"Mr. ELSTON. To determine whether or not good cause was shown.

"General HOOVER. A hearing under the regulations to be prescribed is contemplated; yes, sir.

"Mr. ELSTON. It would be contemplated that in that hearing the accused could appear and offer any evidence and

been claimed or held that the habeas corpus court lacked its traditional jurisdiction.[3]

Thus there exists in the judicial system of the military an effective and still available remedy for petitioner to which he has not resorted. The remedy was created for the benefit of persons in petitioner's class and there is no conceivable reason why he should not be required to exhaust it before a civil court is asked collaterally to review the judgment of a military tribunal in a habeas corpus proceeding. Instead, that avenue of relief affords petitioner a review of much more

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could have counsel representing him for the purpose of convincing the Judge Advocate General that a new trial should be granted.

"General HOOVER. Yes, sir.

"Mr. ELSTON. In other words, it would not be passed upon simply on the petition itself?

"General HOOVER. Nor on the record of trial itself. The accused person would be offered every reasonable opportunity to present anything that he wished in support of his motion for a new trial.

"Mr. ELSTON. I am glad you clarified that because it is not entirely clear from the section itself, and that question certainly would be raised.

"General HOOVER. I think it must be clear. I think the authority for granting new trials would not be effective unless the opportunity for a hearing be provided. In drafting the amendment, it was contemplated that such matters would be covered in the regulations to be prescribed by the President."

[3] *Chaney* v. *Arnold*, No. 1386 H. C., D. C. Kan., March 27, 1950, writ denied, petition dismissed on other grounds June 19, 1950; (AW 53 application for relief had been denied March 21, 1950); *Evans* v. *Hunter*, No. 1472 H. C., D. C.

than the bare jurisdictional questions which are open in habeas corpus. Indeed, AW 53 is particularly appropriate for examination of the kind of errors which he set forth in his petition in this case.

2. *Petitioner's Excuses for not Resorting to AW 53 are Without Merit.*

(a) Petitioner argues that AW 53 is unconstitutional because it provides that the action of the Judge Advocate General "shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States." In petitioner's view, this language deprives the civil courts of jurisdiction to review in any respect the action of the Judge Advocate General and thus amounts to an unconstitutional suspension of the writ of habeas corpus. (Petitioner's Brief in Support of Petition for Certiorari, p. 17.) Since, as we shall show, the finality provision was never intended to interfere with the jurisdiction of a habeas corpus court, it follows that AW 53 is not unconstitutional for the reasons asserted by petitioner.

Kan., June 12, 1950 (pending); (AW 53 application for relief had been denied April 14, 1950); *McKinney* v. *Hunter*, No. 1439 H. C., D. C. Kan., March 15, 1950, writ denied, petition dismissed on other grounds June 19, 1950; (AW 53 application had been denied August 23, 1949).

Parenthetically, it may be noted that a finality provision in identical language appears in AW 50 (h) (10 U. S. C., Supp. II, 1521 (h)) which relates to action in reviewing or confirming a conviction upon ordinary appellate review. Thus with respect to convictions after February 1, 1949, the same statutory finality applies regardless of whether an AW 53 petition is filed.

It is perfectly clear, both from the legislative materials and from the construction adopted by the President in regulations issued pursuant to the legislation, that the finality provisions do not, and were not intended to, deprive the habeas corpus courts of their traditional powers to review collaterally judgments of military tribunals for jurisdictional errors. At the last term of this Court, the Court stated in *Hiatt* v. *Brown*, 339 U. S. 103, 111, that:

> It is well settled that "by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial * * *. The single inquiry, the test, is jurisdiction."

While this finality of court martial proceedings—which did not preclude judicial scrutiny of jurisdictional issues—has been established by judicial decision, the Articles of War, prior to the 1948 amendments, did not so provide in express terms. By adding the finality provisions of AW 50 (h) and AW 53, Congress simply made explicit

what had been the practice throughout the years. Thus, Brigadier General Hoover, testifying in support of the legislation, explained with reference to AW 50 (h) that "the principle [of finality] is well established at present but the amendment is somewhat more definite than the present article." Hearings, note 2, *supra*, p. 2118. The House Report (No. 1034, 80th Cong., 1st sess., pp. 7, 12) similarly states that the amendment "makes explicit the finality of sentences of court martial." The regulations adopted by the President pursuant to the legislation expressly recognize that:

> The proceedings, findings, and sentences of courts-martial as approved, reviewed or confirmed pursuant to the Articles of War are final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings are binding upon all departments, courts, and agencies and officers of the United States, subject only to action upon application for a new trial as provided in Article 53 (AW 50*h*). Only a Federal court has jurisdiction on writ of habeas corpus to inquire whether a court-martial has jurisdiction of the person and the subject matter or whether it exceeded its powers. See chapter XXX. [Manual for Courts-Martial, United States Army, 1949, p. 8.]

Whatever possible doubt there might be as to the meaning of the finality provisions is dispelled by subsequent legislative developments. In May 1950, Congress enacted a Uniform Code of Military Justice to become effective on May 31, 1951. Pub. Law 506, 81st Cong., 2d sess.[4] Article 76 contains a finality provision in the same terms as are used in AW 50 (h) and AW 53. Both H. Rep. 491, p. 35, and S. Rep. 486, 81st Cong., 1st sess., p. 32, state that the finality provision of Article 76 "is derived from AW 50 (h) and is modified to conform to the terminology used in this code." That the finality language was never intended to foreclose "the traditional collateral

[4] While the Uniform Code does not become effective until 1951 and the present Articles of War are not repealed until then (see Section 5 and Section 14 (a), it should be noted that Section 12 of the act reenacts the petition for new trial provisions of AW 53, and that section is made effective May 5, 1950. See Section 5. Thus, until May 31, 1951, both AW 53 and Section 12 of Public Law 506 are in effect. In view of the express provision in Section 14, repealing the Articles of War, including AW 53, on May 31, 1951, and, in view of the express language in Section 12 referring to AW 53, it cannot be argued that Section 12 supersedes AW 53 at this time. For some reason not apparent from the legislative materials, Section 12 fails to include the finality provision contained in AW 53. While the omission of the finality provision in Section 12 appears to have been an oversight, the discrepancy is immaterial, in view of the construction of the finality provision of AW 53 for which we contend. Since the finality provision makes explicit what already is decided by the cases, its presence or absence does not affect the disposition of this case.

review in habeas corpus is expressly stated in the Reports as follows:

> Subject only to a petition for a writ of habeas corpus in a Federal cout, it [Article 76] provides for finality of court-martial proceedings and judgments.

The same understanding was expressed in the Senate debate, as follows (96 Cong. Rec. (daily ed.) 1442):

> Mr. SALTONSTALL. * * * "Subject only to a petition for a writ of habeas corpus in Federal court, it [Article 76, UCMJ] provides for the finality of court-martial proceedings and judgments."
>
> So the question was directly considered by the committee * * *.
>
> Mr. MCCARRAN. That is in the report, but why is it not in the bill?
>
> * * * * *
>
> Mr. KEFAUVER. I call the Senator's attention to the fact that the language about the finality of the finding of the court-martial is identically the same as the language which has been in the law previously. It was in the Kem amendment to the bill passed by Congress in 1948; so that there is nothing new about the language in the proposed Uniform Code.
>
> * * * * *
>
> The point I am trying to make is that the pending bill adds nothing new in the matter of the finality of court-martial proceedings. * * *

> MR. MCCARRAN. What does the bill mean when it says "binding on all departments, courts, agencies, and officers of the United States"? Does not that attempt to bind the courts?
>
> Mr. KEFAUVER. As I said, it is the same language at that which was in the Kem amendment in 1948. It attempts to bind the courts on all matters except jurisdictional matters.

Bearing in mind the fact that the same committees of Congress considered the 1948 and 1950 legislation, that the finality provision of the 1950 legislation is derived from the 1948 enactment, and that the interval of time between the two enactments is less than two years, there can be no doubt that Congress did not intend to foreclose habeas corpus review in appropriate cases. See *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317, 329–330.

To the extent that petitioner's argument rests on the contention that the writ is unlawfully suspended if the prisoner is required to exhaust first his other remedies, it collides with settled judicial and legislative practice. From the enactment of the first Judiciary Act of 1789 (1 Stat. 73, 81) Congress has authorized issuance of the writ in situations "warranted by the principles and usages of law." In cases involving state prisoners, exhaustion of state remedies has always been recognized as a prerequisite to habeas corpus without any thought that the result was

to suspend the operation of the writ. See p. 5, *supra*. And, as we have shown, the 1948 revision of the Judicial Code incorporates the exhaustion of remedies concept into the habeas corpus provisions. The courts have not been persuaded that the application of a wise principle of judicial administration in any manner amounts to a suspension of the writ. *Martin* v. *Hiatt*, 174 F. 2d 350, 352 (C. A. 5); *Barrett* v. *Hunter*, 180 F. 2d 510 (C. A. 10); *St. Clair* v. *Hiatt*, 83 F. Supp. 585 (N. D. Ga.), affirmed, 177 F. 2d 374 (C. A. 5), certiorari denied, 339 U. S. 967; *Wong* v. *Vogel*, 80 F. Supp. 723 (E. D. Ky.). Cf. *United States* v. *Sing Tuck*, 194 U. S. 161, 170; *Glasgow* v. *Mayer*, 225 U. S. 420; *Johnson* v. *Hoy*, 227 U. S. 245; *Riggins* v. *United States*, 199 U. S. 547; *Minnesota* v. *Brundage*, 180 U. S. 499; *Baker* v. *Grice*, 169 U. S. 284.

b. Petitioner also argues that a voluntary submission to the procedures of AW 53 will amount to a waiver of his constitutional right to resort to habeas corpus. But this argument rests entirely on his view that the finality provision of AW 53 forecloses habeas corpus review. Since there is no basis for that construction of AW 53, it follows that petitioner will not estop himself from resort to habeas corpus if he is unsuccessful in an application for a new trial under AW 53. Indeed, as we have shown, *supra*, applications for habeas corpus have been considered by the federal courts after the denial of an AW 53 petition.

c. Petitioner also argues that to require him to exhaust the remedy provided by AW 53 gives that Article of War a retroactive effect. In support of this argument he points to the fact that he filed his petition for habeas corpus prior to February 1, 1949, when AW 53 became effective. The short answer is that no effort is being made to apply AW 53 retroactively. AW 53 is a remedy presently available at the very time petitioner is seeking to invoke the jurisdiction of the civil courts. He must exhaust that present remedy before he is entitled to pursue his petition for a writ of habeas corpus. The situation would be no different in the case of a prisoner previously convicted in the state or federal courts. Before he would be entitled to a writ of habeas corpus he would be required to demonstrate that he had complied with Sections 2254 or 2255 of 28 U. S. C., as the case may be, notwithstanding that those provisions were enacted subsequent to his conviction. In this respect, the case is similar to the many habeas corpus cases from Illinois after the Illinois Post-Conviction Hearing Act was adopted in which resort to a subsequently created state remedy was required. See e. g., *Walker* v. *Ragen* (and six other similar cases), 338 U. S. 833; *Marks and James* v. *Ragen*, 339 U. S. 926; see also *United States ex rel. Peters* v. *Ragen*, 178 F. 2d 377 (C. A. 7); *United States ex rel. Hamby* v. *Ragen*, 178 F. 2d 379 (C. A. 7);

United States ex rel. DeFrates v. *Ragen*, 181 F. 2d 1001 (C. A. 7). There likewise is no merit to petitioner's argument that the doctrine of exhaustion of administrative remedies may not be applied to him because it was asserted for the first time in the Court of Appeals. We believe that the court below properly disposed of the argument with the answer that the principle involves a matter of judicial administration which the Court could apply even if respondent had not urged it. The Illinois cases cited in the last paragraph are equally applicable on this point.

d. There is no merit to the related argument that, as a matter of construction, AW 53 does not and was not intended to apply to World War II court-martial cases in which, as in this case, the appellate review had been completed prior to the effective date of the Article, or that it does not apply where habeas corpus proceedings had been initiated prior to the effective date of the statute. The statute is explicitly applicable to World War II cases, and its avowed purpose was to provide a corrective procedure for possible injustices which arose in the hurly-burly of war. While Executive Order 10020,[8] which promulgated the

[8] The Executive Order is in the following terms:

"PRESCRIBING THE MANUAL FOR COURTS-MARTIAL, U. S. ARMY, 1949

"By virtue of the authority vested in me by Chapter II of the act of Congress entitled 'An act to amend an act entitled "An Act for making further and more effectual

Manual for Courts-Martial, United States Army, 1949, provides that investigations, trials or other action begun before February 1, 1949, may be completed in accordance with the provisions of the 1928 Manual for Courts-Martial, the Order states that the 1949 manual shall be in force and effect on and after February 1, 1949, "with respect to all court-martial processes taken on or after February 1, 1949." A petition for new trial is such a process. Chapter 22 of the 1949 Manual (pp. 108–110), specifically relating to the AW 53 remedy, contains no limitation restricting the remedy to convictions after February 1, 1949. Any doubt in this respect is resolved by Section 12 of Public Law 506, *supra,* which reenacts the remedy afforded by AW 53, and which, in express terms, applies to "any court-martial case involving offenses committed during World War II."

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provision for the national defense, and for other purposes," approved June 3, 1916, and to establish military justice,' approved June 4, 1920 (41 Stat. 787), as amended by Title II of the act entitled 'An act to provide for the common defense by increasing the strength of the armed forces of the United States, including the reserve components thereof, and for other purposes,' approved June 24, 1948 (62 Stat. 627), and as President of the United States, I hereby prescribe the following Manual for Courts-Martial to be designed as 'Manual for Courts-Martial, U. S. Army, 1949.'

"This manual shall be in force and effect in the Army of the United States on and after February 1, 1949, with respect to all court-martial processes taken on or after February 1, 1949: *Provided*, that nothing contained in this manual shall be construed to invalidate any investigation,

e. Petitioner seeks to liken the AW 53 remedy to a petition for rehearing such as was involved in *Levers* v. *Anderson*, 326 U. S. 219. However, the foregoing discussion of the place of AW 53 in the scheme of military justice makes it plain that the remedy is not comparable to the limited procedure for correcting decisions on the basis of a preexisting record such as is involved in the usual petition for rehearing. Instead of being a mere formality, such as petitioner argues, the AW 53 remedy affords petitioner a full opportunity to present any facts, either in the record or outside the record, which support his view that he has not been fairly convicted. This post-conviction procedure was created for the very purpose of permitting complete reconsideration, thus allowing the military authorities to correct any injustices which may have arisen. Particu-

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trial in which arraignment has been had, or other action begun prior to February 1, 1949; and any such investigation, trial, or action so begun may be completed in accordance with the provisions of the Manual for Courts-Martial, 1928: *Provided further*, that nothing contained in this manual shall be construed to make punishable any act done or omitted prior to the effective date of this manual which was not punishable when done or omitted: *And provided further*, that the maximum punishment for an offense committed prior to February 1, 1949, shall not exceed the applicable limit in effect at the time of the commission of such offense.

[Signed] HARRY S. TRUMAN.

THE WHITE HOUSE,
December 7, 1948."

larly in the light of the experience gained in the application of AW 53, in which 11.7 percent of the petitions for relief have been granted, to require petitioner to file a petition under AW 53 is not to require him to do a useless act.

CONCLUSION

Petitioner has not exhausted a presently available remedy. If he files a petition for new trial under AW 53 and is unsuccessful, he will then be entitled to attack in habeas corpus the jurisdiction of the military tribunal. We respectfully submit that the judgment of the court below should be affirmed.

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OCTOBER 1950.

APPENDIX

Title II of the Act of June 24, 1948 (62 Stat. 604; 10 U. S. C., Supp. II, 1472–1593) amending the Articles of War, provides in pertinent part:

ART. 50. (10 U. S. C., Supp. II, 1521 (h)) Appellate Review.—* * *

* * * * *

h. *Finality of court-martial judgments.*—The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53.

* * * * *

ART. 52. (10 U. S. C., Supp. II, 1524) *Rehearings.*—When any reviewing or confirming authority disapproves a sentence or when any sentence is vacated by action of the Board of Review or Judicial Council and the Judge Advocate General, the reviewing or confirming authority or the Judge Advo-

cate General may authorize or direct a rehearing. Such rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding.

ART. 53. (10 U. S. C., Supp. II, 1525) *Petition for new trial.*—Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge, previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided,* That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided,* That only one such application for a new trial may be entertained with regard to any one case: *And provided further,* That all action by the Judge Advocate General pursuant to this article, and

all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States.

The Act of May 5, 1950 (Pub. Law 506, 81st Cong., 2d sess.), establishing, *inter alia,* a Uniform Code of Military Justice, provides in pertinent part:

SEC. 1. * * *

* * * * * *

ART. 76. Finality of court-martial judgments.

The appellate review of records of trial provided by this code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or affirmation as required by this code, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by

the Secretary of a Department as provided in article 74, and the authority of the President.

* * * * *

SEC. 5. This Act shall become effective on the last day of the twelfth month after approval of this Act, or on July 1, 1950, whichever date is later: *Provided,* That the provisions of article 67 (a) of this Act shall become effective on the last day of the ninth month after approval of this Act: *Provided further,* That the provisions of section 12 of this Act shall become effective on the date of the approval of this Act.

* * * * *

SEC. 12. Under such regulations as the President may prescribe, The Judge Advocate General of any of the armed forces is authorized upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad-conduct discharge, previously executed, a form of discharge authorized for administrative issuance, in any court-martial case involving offenses committed during World War II in which application is made within one year after termination of the war, or after its final disposition upon initial appellate review whichever is the later: *Provided,* That only one such application for a new trial may be entertained with regard to any one case: *And provided further,* Within the meaning of this section and of article of war 53, World War II shall be deemed to have ended as of the effective date of this Act.

* * * * *

SEC. 14. The following sections or parts thereof of the Revised Statutes or Statutes at Large are hereby repealed. Any substantive rights or liabilities existing under such sections or parts thereof prior to the effective date of this Act shall not be affected by this repeal, and this Act shall not be effective to authorize trial or punishment for any offense if such trial or punishment is barred by the provisions of existing law:

(a) Chapter II of the Act of June 4, 1920 (41 Stat. 759, 787–811, ch. 227), as amended, except Articles of War 107, 108, 112, 113, 119, and 120;

* * * * *

The Judicial Code provides in part:

§ 2254. State custody; remedies in State courts.

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

§ 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court of the United States claiming the

right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

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